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Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 14 April 2011**

Criminal legal aid fees system

Purpose

This paper provides background information and a brief account of the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on the criminal legal aid fees system.

Background

Existing criminal legal aid fees system

Prescribed level of fees

2. The Legal Aid Department ("LAD") engages counsel and solicitors in private practice as defence lawyers in criminal legal aid cases. The scale of fees payable to these lawyers as well as the fee assessment mechanism are prescribed in Rule 21 of the Legal Aid in Criminal Cases Rules ("LACCR"), subsidiary legislation of the Criminal Procedure Ordinance (Cap. 221). While legally the scale of fees only binds LAD, the Department of Justice ("DoJ") adopts the same fee scale on an administrative basis in engaging lawyers in private practice to prosecute in criminal cases on behalf of the Government, with a view to ensuring that neither LAD nor DoJ would have any advantage in competing for lawyers. For the same reason, fees for duty lawyers providing legal representation under the Duty Lawyer Scheme¹ are also based on the brief fee payable by DoJ to engage counsel to appear in the Magistrates' Courts as prosecuting counsel. Since 1992, the Administration has been reviewing these fees on a biennial basis,

¹ The Duty Lawyer Scheme of the Duty Lawyer Service was established in 1979 to supplement the legal aid services provided by the Legal Aid Department under the Legal Aid Ordinance (Cap. 91). The Duty Lawyer Scheme provides legal representation to eligible defendants who appear in Magistrates' Courts, Juvenile Courts and Coroners' Courts.

having regard to changes in consumer prices during the reference period, actual or anticipated difficulties in engaging the services of private counsel and solicitors, and other factors such as the state of the economy and office rentals. As a result of the 2008 biennial review, the fees have been raised by 8.3% in accordance with the movement in Consumer Price Index (CPI) (C) during the reference period from July 2006 to July 2008. The existing fees are set out in **Appendix I**.

Criminal legal aid fees system vis-à-vis the prosecution fees regime

3. While the fees payable to lawyers in private practice engaged for criminal litigation work by DoJ and LAD follow the same scale on an administrative basis, the two systems operate differently in relation to the procedure and authority for increasing the fees payable to lawyers. In response to the Panel, the Administration has explained the differences between the two systems as follows –

(a) Determination of fees

The briefs of DoJ are "marked brief", i.e. fees are marked before the work is done. For legal aid cases, LAD can only assess the fees "having regard to the work actually and reasonably done" in accordance with Rule 21(1) of LACCR and the scale of fees permitted under LACCR. The current approach is for LAD to agree with individual assigned lawyers the fees level after the conclusion of the cases.

(b) Fees payable at a level that exceeds the statutory limits

DoJ may pay an additional fee called "reading in refresher" calculated at daily refresher fee if the pre-trial preparation work required as assessed by counsel is substantially over and above that required for normal cases. For non-standard briefing out work involving more complex and lengthy cases, DoJ adopts a "tender" system whereby quotations are sought from practitioners and examined critically by a Selection Board.

LAD can increase the brief fee and refresher fee payable to an assigned counsel/solicitor beyond the maximum rates if the assigned solicitor or counsel obtains from the Court a certificate of exceptional complexity/length. LAD has explained that it cannot adopt a tender system partly because the fees have to be assessed on "work actually and reasonably done" basis, and partly because of

time constraint. LAD has no control over when a legal aid applicant may come forward for assistance. He may lodge his application for legal aid shortly before hearing, and the urgency simply precludes the possibility of selecting counsel through a tender process. Where senior counsel are assigned nonetheless, their fees are subject to negotiation and are paid at non-standard rates.

Review of the criminal legal aid fees system

4. The request for a comprehensive review of the remuneration system for lawyers engaging in criminal legal aid work was made by the two legal professional bodies in 2003. At the Panel meeting on 15 December 2005, members noted the following concerns raised by the two legal professional bodies over the existing criminal legal aid fees system -

- (a) the Director of Legal Aid ("DLA") had no discretion to pay more than the maximum fees stipulated in LACCR. The fees stipulated in LACCR were unrealistically low and the brief fee was far from adequate to compensate preparation work in complex cases;
- (b) while the Court might grant certificates of exceptional complexity and/or length upon application by legal aid lawyers, and thus allow DLA to award a top-up fee, this was not entirely satisfactory as there were no guidelines for the trial judge to grant the certificate and for DLA to calculate the enhanced fee; and
- (c) compared with the relatively more flexible arrangements adopted by DoJ in the prosecution fees regime, the existing criminal legal aid fee system was not conducive to the principle of equality of arms between prosecution and defence, resulting in a situation whereby the legally-aided client would be represented by a far less experienced defence lawyer.

Past discussions of the Panel

Proposed structure of the criminal legal aid fees system

5. In response to the call for change by the two professional bodies, the Administration had reviewed the criminal legal aid fees system and had discussed the relevant issues with the Panel at six meetings held between December 2005 and June 2009. At the meeting on 26 February 2007, the Panel noted that the Administration had reached a broad consensus with the two legal professional bodies on the structure of the new criminal legal aid fees system ("the new fee structure"), which would operate on a marked-brief basis.

According to the Administration, the new fee structure would bring about major improvements, i.e. proper recognition for preparation or pre-trial work, rationalization of fee items, and enhanced transparency for the fee setting and re-determination basis. A summary of the proposed changes in the new structure as provided by the Administration is in **Appendix II**.

Basis for setting the fee rates under the new fee structure

6. In March 2007, the Administration had proposed rates for various items for different levels of court under the new fee structure for the consideration of the two legal professional bodies. The Law Society considered the proposed fee rates for the new system unreasonable, particularly for the more experienced solicitors. The Law Society expressed concern that the low fee rates would discourage experienced lawyers from participating in criminal legal aid work and result in a significant shrinking of the pool of solicitors working on criminal legal aid cases. The Law Society's position was that the hourly rates for solicitors undertaking criminal legal aid work should be on par with the civil taxation rates used for remunerating civil legal aid work².

7. When the issue was last discussed at the meeting on 22 June 2009, the Panel noted that the Administration had offered a revised proposal on fee rates for the consideration of the Law Society. The revised rates (simplified as hourly rate) for instructing solicitors taking up criminal legal aid cases would be enhanced to \$620, \$730 and \$990 for District Court, Court of First Instance and Court of Appeal respectively. A comparison of the current rate and the proposed rate for solicitors (simplified as hourly rates) as provided by the Administration in June 2009 is at **Appendix III**.

8. Members noted the Law Society's view that the revised rates were inadequate and did not properly reflect the professional responsibilities of solicitors in criminal legal aid cases which were getting increasingly complex. The Law Society had also expressed grave concern about the Administration's failure to address properly the major principles of issues it had raised, namely the lack of parity in the remuneration for solicitors engaged in civil and criminal legal aid work, and the yardsticks for reviewing criminal legal aid fees in future. The Bar Association agreed with the view that solicitors should be remunerated properly for their work in criminal legal aid and considered the Law Society's request for parity with civil legal aid work justified.

² Under the current civil taxation rate scale, the party-to-party taxation rates for High Court proceedings are \$1,600 to \$2,000 per hour for a newly admitted solicitor and \$2,400 to \$3,000 for a solicitor with five to six years' experience, while those for District Court proceedings are \$1,066 to \$1,280 per hour for a newly admitted solicitor and \$1,600 to \$2,000 for a solicitor with five to six years' experience.

9. The Administration advised that it had carefully examined the Law Society's proposal for minimizing the disparity of remuneration for solicitors engaged in civil and criminal legal aid cases and had also consulted the Department of Justice on the matter. Their consolidated view was that the nature of and work entailing to civil and criminal legal aid cases was different. As such, the Administration could not accede to the request at this stage. As regards the yardsticks for future review, the Administration advised that it had adopted the following general yardsticks in reviewing the fee proposals: (i) general compatibility of the criminal legal aid fee system for the defence lawyers with the fee regime for the prosecution counsel; (ii) rectification of inconsistency between policy on payment to solicitors and counsel; (iii) reasonable and effective remuneration for legal aid assigned lawyers within the remits of public affordability; and (iv) prudence in public money spending. The Administration pointed out that if the new fee structure and increased rates were to be adopted, Government expenditure in criminal legal aid fee was expected to increase by an additional \$100 million, which was more than double the current level, and the remuneration for solicitors would be increased by 120% to 400%, depending on individual cases. The Administration also undertook to continue to discuss actively with the Law Society with a view to reviewing the rates in two years' time upon the implementation of the new rates.

10. Some members including Mr Albert HO and Mr James TO considered that the revised proposal on fee rates for solicitors, though not satisfactory, could be accepted as a basis with a view to achieving further upward adjustment in future, so that the increased rates could be implemented as soon as possible. Members in general were of the view that future review of fee rates must be based on mutually accepted principles. Some members also considered that in determining the level of fees for solicitors, it was important to have regard to the principle of ensuring equality of arms between prosecution and defence. The Panel urged the two parties to iron out their differences as far as practicable and requested the Administration to report to the Panel when they were able to come to an agreement on the matter.

Taxation

11. At the meeting on 26 February 2007, members noted that the Law Society objected to the proposal of DLA being the final arbitrator on fee disputes between assigned lawyers and LAD, having regard to the principles of natural justice. The Law Society considered taxation the best way to resolve disputes on criminal legal aid fees. Alternatively, the jurisdiction of the Legal Aid Review Committee which was a committee established under section 26A(1) of the Legal Aid Ordinance (Cap. 91) could be expanded or a statutory body should be set up

to adjudicate on fee disputes. The Bar Association and some members of the Panel concurred with the view of the Law Society. It was pointed out that the civil legal aid fee system also adopted a taxation system. As there were very few disputes on civil legal aid fees being resolved by taxation, the same was envisaged for criminal legal aid fees.

12. The Administration explained that under the civil legal aid system, LAD and assigned lawyers had no prior agreement on the fees; hence taxation at the end of a case would be appropriate. However, under the proposed marked brief system for criminal legal aid cases, fees were agreed beforehand which rendered taxation for resolving disputes on criminal legal aid fees unnecessary. In addition, assigned lawyers could seek LAD's re-determination of fees both during and at the end of the case. Hence, the Administration did not see the need for a taxation system for resolving disputes on criminal legal aid fees. The Administration was requested to consult the Legal Aid Services Council on the Law Society's suggestion in the preceding paragraph and inform the Panel accordingly.

Latest developments

13. In its paper to the Panel in December 2010 [LC Paper No. CB(2)638/10-11(01)], the Administration advised that it had reached an agreement with the two legal professional bodies on the review of the criminal legal aid fee structure and the fee level and was working on the legislative amendments to reflect the agreed changes, as follows -

(a) Preparation or pre-trial work

Under the current system, solicitors and counsel are paid a "flat" fee for pre-trial preparation, irrespective of the time spent. Under the proposed system, pre-trial work will be remunerated according to the time required.

(b) Rationalization of fee items

At present, where a conference has taken place among the assigned lawyers and the legally aided defendant, the counsel, but not the solicitor, is eligible for a "conference fee". Under the proposed structure, conference fee will also be payable to solicitors on an hourly basis.

(c) Enhanced transparency for the fee setting and re-determination basis

At present, the fee payable to an assigned lawyer is assessed after the work is done and the case concluded. Under the proposed system, the classification of a particular case and hence the rates, as well as the required preparation time will be assessed beforehand and marked on the brief when making the assignment. Assigned lawyers will be allowed to view the bundle before accepting assignments whenever circumstances permit. Such measures are designed to enhance the transparency of the fee system.

(d) New fees for solicitors

For instructing solicitors, the revised rates (simplified as hourly rate) will be enhanced to \$620, \$730 and \$990 for District Court, Court of First Instance and Court of Appeal respectively.

Legislative timetable

14. The Administration is scheduled to brief the Panel on the relevant legislative amendments at the upcoming meeting on 14 April 2011. According to the Administration's working timetable, it plans to submit the legislative amendment rules, which are subject to the positive vetting procedure, to the Legislative Council ("LegCo") for consideration of approval in May/June 2011. Subject to discussions by LegCo, the amendment rules are expected to be put into effect in June/July 2011.

Relevant papers

15. A list of the relevant papers available on the LegCo website is in **Appendix IV**.

Appendix I

**Criminal Legal Aid Fees,
Prosecution Fees and Duty Lawyer Fees**

<u>Nature of fee</u>	<u>Department/ Service</u>	<u>Current Maximum (\$)</u>
1. Court of First Instance Cases		
(a) Counsel		
(i) brief fee	LAD/DOJ*	22,100
(ii) refresher fee per day	LAD/DOJ*	11,050
(b) Solicitor		
(i) brief fee	LAD^	7,350
(ii) refresher fee per day	LAD^	890 to 4,780
(c) Conference per hour (counsel)	LAD/DOJ	1,160
(d) Pre-trial review (per review)	DOJ	2,190
2. District Court Cases		
(a) Counsel		
(i) brief fee	LAD/DOJ*	14,720
(ii) refresher fee per day	LAD/DOJ*	7,360
(b) Solicitor (acting as instructing solicitor)		
(i) brief fee	LAD^	5,240
(ii) refresher fee per day	LAD^	1,250 to 3,140
(c) Solicitor (acting as advocate as well as instructing solicitor)		
(i) brief fee	LAD*	18,190
(ii) refresher fee per day	LAD*	10,080
(d) Conference per hour (counsel)	LAD/DOJ	950
(e) Brief fee for mention/sentence	DOJ	2,930
3. Magistrates' Court Cases		
(a) Counsel		
(i) brief fee	DOJ	8,830
(ii) refresher fee per day	DOJ	4,410

<u>Nature of fee</u>	<u>Department/ Service</u>	<u>Current Maximum (\$)</u>
(b) Counsel or solicitor (acting as advocate) in committal proceedings		
(i) brief fee	LAD	8,830
(ii) refresher fee per day	LAD	4,410
(c) Solicitor for instructing counsel in committal proceedings		
(i) brief fee	LAD	2,390
(ii) refresher fee per day	LAD	1,960
(d) Counsel or solicitor acting as advocate in preliminary inquiry		
(i) brief fee	LAD	8,830
(ii) refresher fee per day	LAD	4,410
(e) Brief in place of court prosecutor per day	DOJ	5,880
(f) Duty Lawyer Fee	DLS	5,880 2,930
(g) Pre-trial fee per hour	DLS	720
4. Appeals		
(a) Settling notice of appeal	LAD	2,930
(b) Instructing solicitors for appeals to the Court of Appeal		
(i) from the Court of First Instance	LAD	9,920 1,240 to 6,400
(ii) from the District Court	LAD	7,930 980 to 5,150
(c) Counsel for appeals to the Court of Appeal		
(i) from the Court of First Instance	LAD/DOJ	29,460 14,730
(ii) from the District Court	LAD/DOJ	23,560 11,780

<u>Nature of fee</u>	<u>Department/ Service</u>	<u>Current Maximum (\$)</u>
(d) Conference per hour (counsel)	LAD/DOJ	1,160

Note :

LAD Legal Aid Department

DOJ Department of Justice

DLS Duty Lawyer Service

* Subject to an increase of 10% on the base figures for each of the second to sixth defendant or appellant.

^ Subject to an increase of such amount as appears to the Director of Legal Aid to be proper in the circumstances.

SUMMARY OF PROPOSED CHANGES IN FEE STRUCTURE

The proposed criminal legal aid fee structure will bring about the following major improvements – (a) proper recognition for preparation or pre-trial work; (b) rationalisation of fee items; and (c) enhanced transparency for the fee setting and re-determination basis. A comparison is set out below.

Fee Structure

	Types of fees payable	Existing Structure		Proposed Structure	
		Solicitor	Counsel and solicitor advocate	Solicitor	Counsel and solicitor advocate
1	Brief fee	= refresher fee for 2 days		Retitled as – - “Reading fee” payable on an hourly basis, to cover reading of bundle; and	Brief fee. To cover 1 st 8 hrs of preparation + 1 st day of court hearing
2	Additional preparation fee	x		- “Preparation fee”, to cover pre-trial preparation after reading ¹ .	✓ (assessment: ½ day basis; re-determination : hourly basis)
3	Refresher fee	✓ (full day / half day / short)		Retitled as “court hearing day fee”. To cover 1 st day of court hearing and onward (full day basis)	Refresher fee. To cover 2 nd court hearing day and onward (full day basis)
4	Pre-trial review fee (per review)	✓		✓	
5	Mention hearing fee (per hearing)	✓		✓	
6	Conference fee (per hour)	x	✓	✓	✓
7	Uplift per defendant (10% increase to brief fee, refresher fee / court hearing day fee and other court attendance related fees for each additional aided client, up to a max of 50% where 6 or more aided clients are represented).	✓ (not for Magistrates Court)	✓ (not for Magistrates Court)	✓ (including Magistrates Court)	✓ (including Magistrates Court)

¹ To be paid for each stretch of hours to be specified.

Operational: Assignment

Existing Structure	Proposed Structure
<ul style="list-style-type: none"> - Legal Aid Department (LAD) verbally advises basic particulars of case. 	<ul style="list-style-type: none"> - To facilitate lawyers' consideration and to enhance transparency, lawyers will be allowed to view bundle before accepting assignment, whenever circumstances permit. In any case, LAD will advise the lawyers particulars of the case verbally.

Operational: Re-determination

Existing Structure	Proposed Structure
<ul style="list-style-type: none"> - If the assigned lawyer considers that the case is of exceptional length or are exceptionally complex, they may, in accordance with the Legal Aid in Criminal Cases Rules, apply to court at the conclusion of the case and the court may so certify. - With the certificates, (LAD) may pay additional fees to the lawyers. 	<ul style="list-style-type: none"> - No need to apply to court for certificates of exceptionality. - Re-determination allowed before the conclusion of the case. - For transparency, circumstances that may require re-determination will be spelt out in more detail. For instance, where there is voluminous amount of additional evidence provided by prosecution after case is assigned; where research on special / peculiar legal issues that are not identified at the time of assignment is required; where the legally aided defendant withdraws legal aid or requests for re-assignment of lawyers, etc.

**Comparison of Current Rates and Proposed Rates for Solicitors
Undertaking Criminal Legal Aid Cases**

	(a) Current Rates <i>(simplified as hourly rate)</i>	(b) Proposed Rates under New Structure and New Rates for Solicitors (taking into account the 8.3% price adjustment as a result of biennial review) <i>(simplified as hourly rate)</i>
District Court		
Instructing Solicitor	Not exceeding \$300	Not exceeding \$620 (Original proposal: Not exceeding \$520)
Solicitor- Advocate	Not exceeding \$1,050	Not exceeding \$1,136
Court of First Instance		
Instructing Solicitor	Not exceeding \$425	Not exceeding \$730
Court of Appeal		
Instructing Solicitor	Not exceeding \$570	Not exceeding \$990

Relevant papers on Criminal legal aid fees system

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services ("AJLS Panel")	27.10.2003 (Item IV)	Agenda Minutes
Legislative Council	11.5.2005	Official Record of Proceedings Pages 14 - 20 (Oral question)
AJLS Panel	--	CB(2)1588/04-05(01)
	--	CB(2)2268/04-05(01)
	--	CB(2)260/05-06(01) CB(2)260/05-06(02)
	15.12.2005 (Item VI)	Agenda Minutes
	--	CB(2)2058/05-06(01)
	--	CB(2)563/06-07(01)
	26.2.2007 (Item IV)	Agenda Minutes
	25.6.2007 (Item V)	Agenda Minutes
	25.2.2008 (Item IV)	Agenda Minutes
	20.10.2008 (Item I)	Agenda Minutes
16.12.2008 (Item V)	Agenda Minutes	

Committee	Date of meeting	Paper
	--	CB(2)1439/08-09(01)
	22.6.2009 (Item V)	Agenda Minutes
	--	CB(2)638/10-11(01)

Council Business Division 2
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